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In the Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD, DECEASED, APPELLANT

v.

KERR-MCGEE CORPORATION AND KERR-MCGEE NUCLEAR CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
JOHN H. GARVEY
Assistant to the Solicitor General
LEONARD SCHAITMAN
AL J. DANIEL, JR.
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the award of punitive damages for injury caused by a federally licensed plutonium processing facility is preempted by the Atomic Energy Act.

2. Whether the preemption of punitive damages violates due process or equal protection.

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This brief is submitted in response to the Court's order of October 4, 1982, inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-40a) is reported at 667 F.2d 908. The opinion of the district court denying appellees' post-trial motions (J.S. App. (II) 42a-93a) is reported at 485 F.Supp. 566.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1981 (J.S. App. 1a). A petition for rehearing (J.S. App. 41a) was denied on February 19, 1982. A notice of appeal to this Court (J.S. App. (II) 127a) was filed on May 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution, Section 274(k) of the Atomic Energy Act of 1954, 42 U.S.C. 2021(k), and Okla. Stat. Ann. tit. 23, § 9 (West 1955) are set forth at J.S. App. (II) 137a, 144a, 151a.

STATEMENT

1. Karen Silkwood worked as a laboratory analyst in the Cimarron plant of the Kerr-McGee Nuclear Corporation, a subsidiary of Kerr-McGee Corporation[1] located near Crescent, Oklahoma (J.S. App. 3a). The plant manufactured pins containing plutonium which were used as fuel for nuclear reactors (*ibid.*). It was licensed by the United States Nuclear Regulatory Commission ("NRC").[2]

On November 5, 1974, Silkwood was contaminated with plutonium during her work at the plant. She was immediately decontaminated and placed on a urine and fecal testing regimen (*id.* at 4a-5a). Contamination was again found while she was at work on November 6, and she was again decontaminated. When she reported for work on November 7, 1974, some of her urine and fecal samples showed plutonium contamination and she was contaminated on various parts of her body (*id.* at 5a). It

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[1] Parent and subsidiary will be referred to collectively as "Kerr-McGee" or "appellees."

[2] The Atomic Energy Commission, which originally licensed the Kerr-McGee plant, was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. (& Supp. IV) 5801 *et seq.* Its licensing and regulatory functions were transferred to the Nuclear Regulatory Commission. 42 U.S.C. 5841(f). For the sake of convenience both agencies will be referred to as "NRC."

Kerr-McGee was issued a license "to possess and use special nuclear material in a plutonium processing and fuel fabrication plant." See 10 C.F.R. 70.21(a).

was stipulated that her urine samples had been "spiked" with plutonium. Silkwood's apartment was also found to be contaminated (*ibid*). Silkwood was killed in an automobile accident less than a week later, on November 13, 1974 (*id.* at 6a). An autopsy showed that her body contained "between 25% and 50% of the permissible lifetime body burden [of plutonium] allowed by the [NRC] for plutonium workers" (*ibid.*).

2. Bill M. Silkwood, as administrator of Karen Silkwood's estate, brought this diversity suit against Kerr-McGee in the United States District Court for the Western District of Oklahoma (J.S. App. (II) 42a).[3] He sought damages of $1.5 million under state law for personal injuries (primarily fear and anxiety) suffered by Karen Silkwood between the time of her contamination with plutonium on November 5, 6, and 7, 1974 and her death on November 13, 1974 (J.S. App. 2a; J.S. App. (II) 96a). Damages in the stipulated amount of $5000 were sought for her personal property which had to be destroyed as a result of plutonium contamination (J.S. App. (II) 96a). Liability was asserted on alternative theories of negligence and strict liability (*id.* at 95a). The estate also requested $10 million in punitive damages (*id.* at 109a).[4]

Kerr-McGee asserted by way of defense that the Oklahoma workers' compensation statute barred a common law tort action (*id.* at 78a), and that "substantial compliance" with NRC regulations barred strict liabili-

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[3] The suit originally made allegations of a conspiracy in violation of 42 U.S.C. 1985(3) involving agents of Kerr-McGee and of the Federal Bureau of Investigation. The dismissal of those claims by the district court was affirmed in an earlier appeal. *Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), cert denied, 454 U.S. 833 (1981).

[4] During the trial the estate moved to amend its complaint to seek $70 million in punitive damages, and the district court apparently granted the motion (J.S. App. (II) 109a).

ty, conclusively proved due care, and precluded punitive damages (*id.* at 57a). Kerr-McGee also denied any negligence, and claimed that Silkwood had taken the plutonium to her apartment and contaminated herself (*id.* at 96a).

The district court submitted the case to the jury on alternative grounds of strict liability and negligence (*id.* at 99a-101a). The jury was also instructed that it could award punitive damages "for the sake of example and by way of punishment, if [it found] * * * oppression, fraud, or malice, actual or presumed" (*id.* at 112a). The basis for punitive damages was explained thus (*ibid.*):

> [T]hey are allowed as a punishment to the offender for the general benefit of society, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future.

The jury was told that it could consider compliance with NRC regulations "to negative a finding of the conduct necessary to establish a basis for exemplary damages," but that it was "not bound by [those] standards" (*id.* at 102a):

> Your duty is to determine what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it.

Ibid. The jury awarded actual damages of $505,000 and punitive damages of $10 million (*id.* at 42a-43a). Kerr-McGee's alternative motions for judgment notwithstanding the verdict and for a new trial were denied (*id.* at 42a-93a).

3. The court of appeals affirmed in part and reversed in part (J.S. App. 1a-40a). The court concluded that Silkwood's personal injury claim was work-related and that her exclusive remedy was therefore the Oklahoma workers' compensation scheme (*id.* at 3a-18a). That

scheme did not, however, apply to claims for property damage (*id.* at 18a). The court of apeals agreed that Oklahoma "would apply strict liability to this case of escape of plutonium, a highly toxic and dangerous substance" (*id.* at 20a), and that NRC regulations did not preclude application of strict liability under state tort law (*id.* at 18a-20a). It thus affirmed the $5,000 judgment for loss of personal property (*id.* at 20a-21a).

Finally, the court held that an award of punitive damages "competes substantially with the [NRC] in its regulation of radiation hazards associated with plants handling nuclear material" (*id.* at 24a). Punitive damages are, it said, granted for reasons of punishment and deterrence (*id.* at 22a). And "[a] judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state" (*id.* at 24a). The $10 million punitive damages verdict was reversed (*id.* at 24a).[5]

DISCUSSION

The court of appeals did not consider or discuss the Oklahoma statute whose invalidation is said to be the basis for this appeal. The case thus may not be within this Court's appellate jurisdiction under 28 U.S.C. 1254(2). Treated as a petition for certiorari, 28 U.S.C. 2103, the papers present no issue which warrants review. The questions presented have not been addressed by any other court of appeals, and were correctly decided in this case.

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[5] Judge Doyle concurred in upholding the $5,000 personal property award, but dissented from the court's holding that worker's compensation was the exclusive remedy for Silkwood's personal injury claim, and that punitive damages were preempted by the Atomic Energy Act (J.S. App. 25a-40a).

1. Appellant asserts that this case is within the Court's appellate jurisdiction under 28 U.S.C. 1254(2) because the court of appeals held Oklahoma's punitive damages statute (Okla. Stat. Ann. tit. 23, § 9 (West 1955)) invalid as applied to the circumstances of this lawsuit. In fact, the parties did not discuss the validity of the Oklahoma statute in the court of appeals, and the court of appeals did not mention it in its opinion. Thus the court's decision is consistent with a construction of the state law which would avoid the problem of invalidity, or with a conclusion that the district court acted improperly—under an admittedly valid statute—in instructing the jury on punitive damages. It is doubtful that Section 1254(2) authorizes an appeal under those conditions.

28 U.S.C. 1254(2) states that this Court may review cases in the courts of appeals "[b]y appeal by a party relying on a State statute *held* by a court of appeals *to be invalid* as repugnant to the Constitution * * * or laws of the United States" (emphasis added).[6] Section 1254(2) may be invoked where the court of appeals has held that a state law is invalid, not in all conceivable circumstances, but only as applied to the facts of the case.[7] On the other hand, appellate jurisdiction does not lie where the court has merely construed a state statute

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[6] The holding of invalidity contemplated by Section 1254(2) encompasses determinations that the state law is preempted by a federal statute. *Minnesota* v. *Northern States Power Co.*, 405 U.S. 1035 (1972), aff'g 447 F.2d 1143 (8th Cir. 1971).

[7] See *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 (1978); *Dutton* v. *Evans*, 400 U.S. 74, 76 n.6 (1970); *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 491-492 (1958).

in a manner that avoids questions about its validity.[8] So too "an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification."[9]

The difficulty of distinguishing among these theories, coupled with the principle that statutes conferring appellate jurisdiction on this Court will be narrowly construed,[10] explains the rule that appeals may not be taken from cases where invalidation of the state statute is not a clear or necessary predicate for the court of appeals' decision.[11] In this case the opinion of the court of

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[8] C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4037, at 47-48 (1978); cf. *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 565 (1972) (28 U.S.C. 1252) ("The court avoided holding that the section itself was unconstitutional 'as applied' * * *. Rather, it held that * * * the section must be narrowly construed."); *Hopkins Federal Savings & Loan Association* v. *Cleary*, 296 U.S. 315, 332 n.4 (1935) (Judicial Code, ch. 229, Section 237(a), 43 Stat. 937, as amended, 28 U.S.C. 1257). This Court noted the close parallel in construction of Sections 1254(2) and 1257 in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 675-677 n.11 (1974).

[9] *Phillips* v. *United States*, 312 U.S. 246, 252 (1941) (28 U.S.C. (1940 ed.) 380, as amended, 28 U.S.C. 1253); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (28 U.S.C. 1257(2)).

[10] See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (28 U.S.C. 1254(2)).

[11] See, e.g., *Minnesota* v. *Alexander*, 430 U.S. 977 (1977) (28 U.S.C. 1254(2)); *id.* at 978 n.1 (Stevens, J., dissenting) ("It is arguable, of course, that our mandatory appellate jurisdiction is defeated by the Court of Appeals' failure to make express its invalidation of the statute as applied to the Corps"); cf. *Kulko* v. *California Superior Court*, 436 U.S. 84, 90 n.4 (1978) (28 U.S.C. 1257(2)) ("The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction."); *United States* v. *Christian Echoes National Ministry, Inc.*, *supra*, 404

appeals does not even mention Okla. Stat. Ann. tit. 23, § 9— the statute that appellant contends was held unconstitutional. Neither did the briefs filed by the parties in the court of appeals contest or defend the constitutionality of § 9. Appellees, who disputed the punitive damages awarded by the district court, argued instead that compliance with federal regulations negated the state of mind required for punitive damages, and that such damages—because they amounted to regulation—would impermissibly control conduct that was to be governed exclusively by the Nuclear Regulatory Commission. No. 79-1894 Defendants-Appellants Br. 61-64. Both contentions are consistent with a conclusion that, for the reasons advanced by appellees, the Oklahoma punitive damages statute should not be read to cover this case. Appellant in the portion of his brief responding to those arguments, like the court of appeals, did not mention the Oklahoma law. No. 79-1894 Plaintiff-Appellee Br. 49-54. Moreover, we are informed by counsel for the parties that no certification was made to the Oklahoma attorney general that the constitutionality of the Oklahoma punitive damages law had been drawn in question. See 28 U.S.C. 2403(b).[12]

U.S. at 563-564 (28 U.S.C. 1252) ("The court did not * * * even consider the constitutionality of § 501(c)(3) 'as a whole.' Nor does any part of its opinion hold that the section was unconstitutional 'as applied.'").

In *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), this Court held that an appeal under 28 U.S.C. 1252 was proper even though the district court had not expressly held 26 U.S.C. 3309(b) unconstitutional as applied to certain religious schools. In contrast to this case, however, the determination of unconstitutionality "'was a necessary predicate to the relief'" granted by the district court. Slip op. 11, quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980). The district court *had* expressly held unconstitutional the state unemployment tax, which was adopted to comply with Section 3309. Slip op. 12.

[12] The court of appeals did, of course, speak unambiguously of "preemption" of punitive damages by the Atomic Energy Act. See J.S. App. 21a-24a. But neither the majority *(ibid.)* nor the

What is more, Oklahoma's punitive damages provision is nothing more than a "legislative recognition [of] a common law rule of long standing and acceptance." *Symposium on the Oklahoma Law of Damages*, 6 Okla. L. Rev. 289, 293 (1953). It is part of a codification that restates rules of damages law in the most general terms.[13] The state's courts exercise considerable freedom in interpreting such rules, much as they would the common law which the rules embody. In *Nixon* v. *Oklahoma City*, 555 P.2d 1283 (1976), the Oklahoma Supreme Court held that punitive damages could not be recovered against a municipality because the public had "little direct control" over its agents, and the deterrent effect of such damages was consequently minimal. *Id.* at 1285. "If no social benefit is to be derived from the imposition of exemplary damages, all legal justification for the award collapses" (*ibid.*). The court did not mention Okla. Stat. Ann. tit. 23, § 9 in its opinion.

It is difficult to say whether Oklahoma's courts would find that punitive damages could be awarded in the circumstances of this case. They might conclude, for example, that the "legal justification for the award" was

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dissent (*id.* at 32a-40a) cited any Oklahoma case or statute which might define the circumstances under which Oklahoma allows awards of punitive damages. Instead, the issue addressed by both was whether such awards as a matter of general common law are precluded by the Act. See, e.g., *id.* at 24a ("A judicial award of exemplary damages under state law * * * is no less intrusive than direct legislative acts of the state"); *id.* at 34a ("the issue [is] whether a civil action * * * is subject to preemption"). The conclusion that they are casts no light on whether the common law of Oklahoma, or its statutory embodiment, would require state (and federal diversity) courts to award them anyway.

[13] See, e.g., Okla. Ann. Stat. tit. 23, § 3 (West 1955) ("Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages").

superfluous in light of the criminal and civil penalties which federal law may impose on licensees of plutonium processing and fuel fabrication facilities.[14] Alternatively, they might decide that compliance with federal regulations negates as a matter of state law the state of mind required by § 9. It is also possible that they would conclude, as appellees have contended (Motion to Dismiss or Affirm 18-19), that punitive damages may not be recovered where the plaintiff's action for compensatory damages has been replaced by the workers' compensation law. See Okla. Stat. Ann. tit. 85, §§ 11-12 (West 1970 & Supp. 1981-1982).[15] None of those questions was addressed by the court of appeals, though it should surely have done so before holding that the state's statute unconstitutionally invaded the province of federal law.

Accordingly, it is not clear that Oklahoma's punitive damages law was "held by [the] court of appeals to be invalid" (28 U.S.C. 1254(2)); had the court addressed § 9 directly, it might simply have found it inapplicable. In these circumstances, it may be appropriate to dismiss the appeal for want of jurisdiction.

2. Treated as a petition for a writ of certiorari, 28 U.S.C. 2103, the papers in this case do not present an issue worthy of review by this Court. As appellant and amici the State of Nevada et al. (Amicus Br. 12) recog-

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[14] See pages 13-14, *infra*.

[15] This uncertainty about the bounds of common law principles explains in part the limitation put on appeals by 28 U.S.C. 1254(2): it provides mandatory review when a state statute is held invalid, but not when state common law is displaced. It is not clear whether a state may finesse the distinction by making a statutory declaration of common law, as Oklahoma has in its damages statute. Cf. J.S. 17-22 ("The Decision Below Violated the Standards Respecting Preemption of Common-Law Rights Recognized by This Court."). But the Court need not address that question in this case, since the court of appeals did not consider the coverage of Okla. Stat. Ann. tit. 23, § 9.

nize, "[t]his is the first case involving nuclear power in which punitive damages have been awarded by a jury" (J.S. 13). If the issue of punitive damages is one which may arise with some frequency in the future, and if (contrary to the government's belief) the question of preemption was decided incorrectly in this case, a resolution by this Court should await more mature consideration by other courts of appeals. None of the 13 states (except New Mexico) filing as amici is located within the Tenth Circuit. Each will thus have an opportunity to address the question anew, either as amicus or—if a state statute like Minnesota's (Minn. Stat. Ann. § 549.20 (West Supp. 1982)) should be drawn in question—as an intervening party. See 28 U.S.C. 2403; Fed. R. Civ. P. 24(b). Moreover, the court of appeals' decision explicitly declares that state law—including rules of strict liability—is to govern all questions of compensation for personal injuries and property damage arising from incidents short of an "extraordinary nuclear occurrence" (J.S. App. 19a-20a, quoting 42 U.S.C. 2210(n)).[16] Thus the only state interest affected by the decision is the interest in independently punishing and deterring, by discretionary jury awards of punitive damages, activities already subject to strict control by the NRC.

3. The court of appeals was clearly correct in holding that punitive damages may not be awarded in the circumstances of this case. The Atomic Energy Act explicitly precludes state regulation of plutonium processing facilities "for purposes [of] protection against radiation hazards." 42 U.S.C. 2021(k). The NRC has implemented through regulations its statutory duty to provide such protection. Punitive damages were awarded

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[16] Only because Oklahoma would apply its workers' compensation law to appellant's personal injury claim did the court reverse the award of $500,000 damages for those injuries (J.S. App. 3a-18a).

in this case, at the instruction of the trial judge, for the explicit purpose of affording that same protection. Nothing in the Price-Anderson Act, 42 U.S.C. 2210, authorizes such an award despite its inconsistency with the Atomic Energy Act.

a. Section 274(k) of the Atomic Energy Act of 1954, 42 U.S.C. 2021(k), provides:

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

In *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (1971), the Eighth Circuit held invalid an effort by the Minnesota Pollution Control Agency to regulate by permit the level of radioactive liquid and gaseous discharges from Northern States' nuclear power plant, and to require monitoring programs for the detection of such releases. The court of appeals found in Section 274(k) a declaration that "the federal government possessed exclusive authority over radiation hazards" (447 F.2d at 1150). This Court summarily affirmed. 405 U.S. 1035 (1972). Other courts have come to the same conclusion. *People of Illinois* v. *General Electric Co.*, 683 F.2d 206, 215 (7th Cir. 1982), petition for cert. pending, No. 82-648 (filed Oct. 12, 1982); *Washington State Building & Construction Trades Council* v. *Spellman*, 684 F.2d 627, 630 (9th Cir. 1982).

The authority which Section 274(k) says is withheld from the states is given by the Act to the NRC. Congress gave the Commission power "to govern the possession and use of special nuclear material,"[17] and to "govern[] the design, location, and operation of facilities" that use such material "in order to protect health and to minimize danger to life or property * * *." 42

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[17] "Special nuclear material" includes plutonium. 42 U.S.C. 2014(aa).

U.S.C. 2201(b) and (i)(3). Licenses for use and transfer of plutonium and for the operation of production facilities require compliance with Commission "safety standards * * * to protect health and to minimize danger to life or property * * *." 42 U.S.C. (& Supp. IV) 2073(e)(7), 2077, 2133(b). As this Court noted in its first decision involving the licensing provisions of the Act, "the responsibility for safeguarding [the] health and safety [of the public] belongs under the statute to the Commission." *Power Reactor Development Co.* v. *International Union of Electricians*, 367 U.S. 396, 404 (1961).

The NRC has promulgated detailed regulations implementing its responsibilities under the Act, 10 C.F.R. Parts 0-170, including requirements which plants like Kerr-McGee must observe for protection against radiation. 10 C.F.R. Part 20. Under these standards, licensees must not only comply with specific exposure limits, but "should * * * make every reasonable effort to maintain radiation exposures * * * as low as is reasonably achievable." 10 C.F.R. 20.1(c).

Violations of the Atomic Energy Act and the regulations enforcing it are subject to strict criminal and civil penalties. 42 U.S.C. (& Supp. IV) 2271-2284. Criminal conviction for willful violations of various provisions of the Act may result in substantial fines and imprisonment. 42 U.S.C. (& Supp. IV) 2272-2279, 2283-2284. The Attorney General may seek injunctive relief to prevent or stop violations of the Act or NRC regulations or orders. 42 U.S.C. 2280. Finally, the NRC itself can impose civil penalties for violations of specific licensing provisions of the Act. 42 U.S.C. (& Supp. IV) 2282. In 1980 Congress increased the maximum civil penalty to $100,000 per violation; if the violation is a continuing one, each day constitutes a separate violation. 42 U.S.C. (Supp. IV) 2282(a). Finally the NRC can initiate proceedings to modify, suspend, or revoke any license

issued under the Act, and in an emergency, can make such action effective immediately. 10 C.F.R. 2.201, 2.202, 2.206; see *id.*, Section 70.61-70.62.

b. Rather than permit the award of punitive damages, the state of Oklahoma might in this case have attempted to conduct its own investigation of the operation of appellee's plant after learning that Silkwood had been contaminated with plutonium. On the basis of such an investigation, a state agency might have determined that appellees had recklessly and wantonly violated state regulations governing the operation of their plant, and thereby permitted the diversion of plutonium. If on the basis of such an investigation and determination a state agency had levied against appellees a $10 million fine, there is no doubt that its action would be preempted by the Atomic Energy Act.

In this case the district court instructed the jury that under state law it should make its own determination of "what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it" (J.S. App. (II) 102a; see *id.* at 72a). If the jury concluded that appellees' conduct did not satisfy the standards the jury would prescribe, it was permitted to award punitive damages "as a punishment to [appellees] for the general benefit of society" and to restrain and deter similar offenses (*id.* at 112a). Like a civil fine, the award of $10 million punitive damages here directly conflicts with the exclusive authority given the NRC to regulate the health and safety hazards associated with plutonium and production facilities.

c. The Price-Anderson Act, 42 U.S.C. 2210, is relevant to the issue of liability for nuclear accidents in several ways. It requires NRC licensees to purchase private insurance, creates a government indemnity fund, and sets a ceiling on liability for substantial nuclear ac-

cidents.[18] In the case of such accidents the Act also requires those indemnified to waive all legal defenses. 42 U.S.C. 2210(n). Otherwise, questions of liability are assumed to be governed by state tort law. S. Rep. No. 1605, 89th Cong., 2d Sess. 6-10 (1966); see *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 65-66 (1978). The legislative history of the Act gives no indication that Congress considered punitive damages an appropriate state law remedy, given their inconsistency with other provisions in the Atomic Energy Act.

The court of appeals noted—correctly, we believe—that punitive damages are also inconsisent with the Price-Anderson Act's limitation of liability for substantial nuclear accidents (J.S. App. 22a), a point which suggests their unavailability for lesser incidents as well. Appellant disputes that assertion (J.S. 22-24), relying chiefly on the rejection of an Atomic Energy Commission proposal that the government not be liable "for loss or damage caused by bad faith, willful misconduct or gross negligence" on the part of the licensee. *Governmental Indemnity: Hearings Before the Joint Comm. on Atomic Energy*, 84th Cong., 2d Sess. 44 (1956). But the suggestion was rejected not in order to allow punitive damages, but in order to assure compensation in all cases. "[T]he damage to the public is the same, whether caused by any means—willful or nonwillful." S. Rep. No. 296, 85th Cong., 1st Sess. 18 (1957).[19]

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[18] The Price-Anderson Act leaves to the discretion of the NRC the decision whether to impose the financial protection and indemnification provisions on various classes of licensees. 42 U.S.C. 2210(a). The NRC did not extend those requirements to plutonium processing and fuel fabrication plants until after the events giving rise to this case. 42 Fed. Reg. 46 (1977); 10 C.F.R. 140.2(a)(3), 140.13a, 140.20(a) and (f)(1)(ii).

[19] The only specific reference to punitive damages in the legislative history of the Price-Anderson Act of which we are aware was made by Professor David Cavers in a law review ar-

4. Appellant's contention that the denial of punitive damages violates due process and equal protection (J.S. 24-29) is frivolous. As this Court recognized in *Duke Power Co.*, *supra*, 438 U.S. at 84, the only question regarding such claims is whether Congress's decision to preclude punitive damages "is demonstrably arbitrary or irrational." It clearly is not. Congress merely substi-

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ticle attached as appendix 39 to the *Proposed Extension of AEC Indemnity Legislation: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 89th Cong., 1st Sess. 415-416 (1965). Professor Cavers noted the possibility that punitive damages might be imposed under various state laws against a nuclear incident defendant. *Id.* at 415. He recommended that "[t]o avoid this, recovery of punitive damages should be denied in all nuclear cases, except perhaps a case against a wrongdoing individual, who, as to these damages, should not be protected by the operator's insurance or indemnity." *Id.* at 416. In his testimony before the Joint Committee, neither Professor Cavers nor Committee members referred to the issue of punitive damages. *Id.* at 211-223.

The NRC has specified conditions for the waiver of defenses, to be included in indemnity agreements and insurance policies, for claims arising from an extraordinary nuclear occurrence. 10 C.F.R. Part 140. For example, the Waiver of Defenses Endorsement (Extraordinary Nuclear Occurrence) to the Nuclear Energy Liability Policy provides that the companies agree to waive any defenses related to fault, including negligence. 10 C.F.R. 140.91 App. A, para. 1, at 730.

This Endorsement does not apply to punitive damages claims with one exception. In states where only punitive damages are allowed for wrongful death, defenses to punitive damages claims are waived to the extent of actual pecuniary losses. Waivers Endorsement, *supra*, 10 C.F.R. 140.91 App. A, para. 2(c), at 730. The purpose of these provisions "is to assure compensation for injury or damage from an extraordinary nuclear occurrence." 33 Fed. Reg. 6982 (1968).

Although these provisions contemplate that licensees might be sued for punitive damages, they do not indicate the appropriate outcome of such claims. Licensees are permitted to raise all defenses against such claims, including the defense that punitive damages are preempted by the Atomic Energy Act.

tuted for one means of controlling licensees' conduct (a means subject to the whims of a jury), another method implemented by the NRC. Plaintiffs who are the incidental beneficiaries of juries' discretionary punitive awards have no right under Oklahoma law to exemplary damages, see *Amoco Pipeline Co.* v. *Montgomery*, 487 F. Supp. 1268, 1272 (W.D. Okla. 1980), even in order to pay the expenses of litigation. *Cox* v. *Theus*, 567 P.2d 447, 450 (Okla. 1977). They may still receive compensation for harmful licensee misconduct, either under workers' compensation or, in a proper case, in the form of compensatory damages (J.S. App. 3a-21a).

CONCLUSION

Should the Court conclude that it has jurisdiction of the appeal, the judgment of the court of appeals should be affirmed. Alternatively, the appeal should be dismissed and the papers treated as a petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
JOHN H. GARVEY
Assistant to the Solicitor General
LEONARD SCHAITMAN
AL J. DANIEL, JR.
Attorneys

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